88-963 (1)

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In the

Supreme Court of the United States

October Term, 1988

Eva J. Culberson
Petitioner

V.

Veterans Administration
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Eva J. Culberson
(P-30902)
In Pro Per
2230 W. McNichols
Detroit, Michigan 48221
(313) 226-4244

Of Counsel:

Okon Etefia
220 Bagley, #210
Detroit, MI 48226

Arlene Woods
220 Bagley, #210
Detroit, MI 48226

QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS ERRED BY NOT APPLYING THE ANALYSIS SET FORTH IN *MCDONNELL DOUGLAS AND BURDINE* IN REVIEWING THE DISTRICT COURT'S DETERMINATION THAT THE PLAINTIFF, A BLACK FEMALE ATTORNEY WITH THE VETERANS ADMINISTRATION DETROIT OFFICE OF DISTRICT COUNSEL, FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ON THE BASIS OF RACE AND SEX BY SHOWING THROUGH ADMISSIONS OF DEFENDANT'S AGENTS AND UNCONTROVERTED EVIDENCE THAT, ALTHOUGH SHE MET THEIR QUALIFICATION STANDARDS FOR A GS-12, SHE WAS HIRED AS A GS-9 ATTORNEY, WHILE A WHITE MALE WHO MET THEIR QUALIFICATION STANDARDS FOR A GS-9 WAS HIRED AS A GS-12 ATTORNEY, AND A WHITE FEMALE WHO MET THEIR QUALIFICATION FOR A

GS-9 ATTORNEY WAS HIRED AS A GS-11 ATTORNEY.

II.

WHETHER THE COURT ERRED BY NOT APPLYING CONGRESSIONALLY MANDATED FEDERAL PERSONNEL POLICY IN REVIEWING THE LOWER COURT'S DECISION THAT DEFENDANT ESTABLISHED LEGITIMATE BUSINESS REASONS AS A DEFENSE.

III.

WHETHER THE COURT'S FAILURE TO APPLY THE THIRD PHASE OF THE TRIPARTITE TEST SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* REGARDING THE ISSUE OF PRETEXT IN REVIEWING THE PLAINTIFF'S CLAIM OF VIOLATION OF TITLE VII IS ERRONEOUS AS A MATTER OF LAW.

IV.

WHETHER THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S EQUAL PAY ACT CLAIM IS IN ESSENCE THE SAME AS HER CLAIM FOR VIOLATION OF TITLE VII WHEN BOTH CLAIMS ARE BASED ON DIFFERENT FACT.

V.

WHETHER THE COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THERE WAS NO EVIDENCE OF A VIOLATION OF THE EQUAL PAY ACT, WHEN THE RECORD CLEARLY REVEALS THAT DEFENDANT ADMITTED AND PLAINTIFF PRODUCED DOCUMENTARY EVIDENCE COMPILED BY DEFENDANT WHICH SHOWS THAT SHE WAS PAID LESS THAN GS-13 WHITE MALE ATTORNEYS FOR PERFORMING WORK AT THE GS-13 LEVEL.

TABLE OF CONTENTS

	Page
Questions Presented.	i
Table of Authorities	vii
Opinion Below.	1
Jurisdiction	1
Statutes, Regulations, and Court Rules Involved	2
Statement of the Case.	3
Synopsis	3
Facts	6
Reasons For Granting Writ.	16
I. THE COURT OF APPEALS ERRED BY NOT APPLYING THE ANALYSIS SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* IN REVIEWING THE DISTRICT COURT'S DETERMINATION THAT THE PLAINTIFF, A BLACK FEMALE ATTORNEY WITH THE VETERANS ADMINISTRATION DETROIT OFFICE OF DISTRICT COUNCIL, FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ON THE BASIS OF RACE AND SEX	21

TABLE OF CONTENTS

Page

II. THE COURT ERRED AS A MATTER OF LAW BY NOT CORRECTLY INTERPRETING AND APPLYING THE FEDERAL STATUTE GOVERNING EMPLOYMENT POLICY BEFORE CONCLUDING THAT DEFENDANT ESTABLISHED "LEGITIMATE BUSINESS" REASONS TO PLAINTIFF'S CLAIMS. 28

III. THE COURT'S FAILURE TO APPLY THE THIRD PHASE OF THE TRIPARTITE TEST SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* REGARDING THE ISSUE OF PRETEXT IN REVIEWING THE PLAINTIFF'S CLAIM OF VIOLATION OF TITLE VII IS ERRONEOUS AS A MATTER OF LAW. 40

IV. WHETHER THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S EQUAL PAY ACT CLAIM IS IN ESSENCE THE SAME AS HER CLAIM FOR VIOLATION OF TITLE VII WHEN BOTH CLAIMS ARE BASED ON DIFFERENT FACT AND THE RECORD CLEARLY REVEALS THAT PLAINTIFF WAS PAID LESS THAN GS-13 WHITE MALE ATTORNEYS FOR THE JOB ACTUALLY PERFORMED.. 45

Conclusion 59

TABLE OF CONTENTS

	Page
Appendix	
Court of Appeals Opinion	1a
District Court Findings and Conclusions.	12a
Judgment	
Applicable Statutes and Court Rules	
Title VII	32a
Equal Pay Act	33a
Federal Personnel Policy.	34a
Other	
Veterans Administrative Qualification Standards	57a

TABLE OF AUTHORITIES

Cases	Page
Anderson vs. City of Bessemer, N.C., 105 S. Ct. 1504, 1513 (1985)	18
Barber vs. International Brotherhood of Boiler Makers, 778 F2d 750, on remand 651 F. Supp 265 (C.A. 11, 1985)	37
Blum vs. Stenson, 465 U.S. 886 (1986).	32
Bose vs. Consumers Powers Union, 104 S. Ct. 1949 (1984).	17
Bradley vs. School Board of City of Richmond, 416 U.S. 696, 711 (1974)	21
Brazemore vs. Friday, 106 S. Ct. 3000 (1986)	18,23,40
Burroughs vs. Office of Personnel Management 764 F2d 1300 (C.A. 9, 1985)	55
Clemmons vs. Board of Education of Hillsboro, 228 F2d 853 (C.A. 6, 1956)	27
Columbus Board of Education vs. Pernick, 443 U.S. 449 (1979)	20
Connecticut vs. Teal, 457 U.S. 440 (1982).	20,38

TABLE OF AUTHORITIES

Cases	Page
Continental Ore Co. vs. Union Carbide Co., 370 U.S. 690, 699 (1962)	26,52
Consumer Product Safety vs. GTE Sylvania, 447 U.S. 102 (1980)	32
Cooper vs. Federal Reserve Bank, 467 U.S. 867 (1984)	23,40
Corley vs. Jackson Police Dept., 566 F2d 994 (5th Cir. 1978)	42
Corning Glass Works vs. Brennan, 417 U.S. 188, 190 (1974)	56
DiSilvio vs. Chamber of Commerce, 416 F. Supp. 844, affirmed in part, modified on other grounds 568 F2d 593 (C.A. 8, 1980).	57
Fitzgerald vs. Sirloin Stockade Inc., 624 F2d 945 (C.A. 10, 1980)	57
Griffin vs. City of Omaha, 785 F2d 620 (C.A. 8, 1986).	26
Griggs vs. Duke Power, 401 U.S. 424 (1971).	19,37
Gunther vs. Washington Co., 623 F2d 1303 (C.A.), affirmed 452 U.S. 161 (1979).	56

TABLE OF AUTHORITIES

Cases	Page
Hishon vs. King, Spaulding, et al, 467 U.S. 69 (1984)	19
International Brotherhood of Teamsters vs. United States, 431 U.S. 358 (1977)	23,42
Inwood laboratories, Inc. vs. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982)	17
Jackson vs. Seaboard Coastline R.R., 678 F2d 992 (11th Cir. 1982)	29
Jennings vs. Tinsley Park Community School, 796 F2d 962 (C.A. 7, 1986)	39
Lafferty vs. Northwestern Airlines, Inc., 567 F2d 429 (1976), cert. denied 434 U.S. 1086	57
Los Angeles Department of Water and Power vs. Manhart, 435 U.S. 702 (1978)	58
McDonnell vs. SantaFe Trail Transportation Co., 427 U.S. 273 (1976)	42
McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973)	22,23,40,42
Morgan Guaranty Trust Co. vs. Blum, 649 F2d 342 (C.A. 5, 1981)	29

TABLE OF AUTHORITIES

Cases	Page
Musico vs. Champion Credit Corp., 764 F2d 102 (C.A. 2, 1985)	29
Page vs. Bolger, 645 F2d 227, 231 (C.A. 4, 1981)	42
Pinto Trucking Service, Inc. vs. Motor Dispatch Inc., 649 F2d 530 (C.A. 7, 1981)	29
Philbrook vs. Glodgett, 421 U.S. 707 (1975).	32
Pullman-Standard vs. Swint, 456 U.S. 273 (1982).	17
Ste. Marie vs. Eastern R.R. Assn., 650 F2d 395 (2nd Cir., 1981)	42
Taylor vs. Teletype Corp., 648 F2d 1129, 1135 (8th Cir. 1981)	42
Texas Dept. of Community Affairs vs. Burdine, 450 U.S. 248 (1981).	22,40
Thorpe vs. Housing Authority of City of Durham, 393 U.S. 268 (1969)	21
United States vs. Gypsum, 333 U.S. 364 (1948).	17
Village of Arlington Heights vs. Metropolitan Housing Dev., 429 U.S. 252, 267 (1977).	38

TABLE OF AUTHORITIES

Cases	Page
Worthy vs. U.S. Steel Corp., 616 F2d 698 (3rd Cir. 1980)	42

Statutes and Regulations

29 U.S.C. 206 (d) (1), 203 (d), 203 (x) and 203(e) (2).	45,48
42 U.S.C. 2000e-et. seq.	3,18
5 U.S.C. 2301-2302	35,53,56
5 U.S.C. 5101, 5102, 5104, 5107	47,53,54
5 U.S.C. 5361-5363	33
5 U.S.C. 5332-5334	55
5 C.F.R. 713	43
5 C.F.R. 536.208, 212, and 213.	34,35

Court Rules

Federal Rules of Civil Procedure, Rule 8 (c)	29
Federal Rules of Civil Procedure, Rule 52 (a)	17,26
Federal Rules of Evidence, Rule 803 (6), 8).	30

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Eva Culberson, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on June 27, 1988 and the United States District Court for the Eastern District of Michigan entered on July 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals appears at page 1a of the appendix hereto. The findings and conclusions of the District Court appear at page 8a of the appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1988. The order for denial of petition for rehearing was entered on August 15, 1988. The

jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This suit involves application of the following statutes, regulations, and Court rules (which are reproduced at page 19a, et seq. of the appendix hereto):

29 U.S.C. 206 (d) (1), 203 (d), 203 (x) and 203(e) (2)

42 U.S.C. 2000e-et. seq.

5 U.S.C. 2301-2302

5 U.S.C. 5101, 5102, 5104, 5107

5 U.S.C. 5361-5363

5 U.S.C. 5332-5334

5 C.F.R. 713

5 C.F.R. 536.208, 212, and 213

STATEMENT OF THE CASE

Synopsis

The plaintiff, a black female attorney, brought this action against defendant, an agency of the federal government, for violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et. seq., and for violation of the Equal Pay Act, 29 U.S.C. Sec. 206(d)(1), as amended.

The basis of the Title VII claim is that defendant discriminated against plaintiff on the basis of race and sex in 1979 by circumventing federal employment policy by hiring her at the GS-9 attorney level, despite the fact that she met its qualification standards for the GS-12 attorney level and was promised a GS-11 attorney level position, while it hired a white male at the GS-12 attorney level even though he only met its qualification standards for the GS-9 attorney level and by hiring

a white female at the GS-11 attorney level even though she only met its qualifications for the GS-9 attorney level.

The basis of the Equal Pay Act claim was the fact that plaintiff was paid less than white male GS-13 attorneys for performing the same work at that level.

In defense of the claims, defendant stated in its Answer and Final Pretrial Statement that: "(1) Mr. Fernholz, the hiring official, did not promise the plaintiff that she would be promoted immediately upon passing the bar; (2) the usual "time in grade" as a GS-9 is one year before being promoted to a GS-11; (3) the white male who started the same day as plaintiff as a GS-12 was not similarly situated in as much as he was already an attorney and had been with the VA for several years; (4) assuming that Mr, Fernholz made the promise, it is not binding on the

VA because it is contrary to Agency policy." No other defenses were alleged.

Immediately prior to trial plaintiff made a motion to suppress any affirmative defenses which defendant might raise or seek to raise during the trial. The trail judge took the motion under advisement, but never issued a decision on it. Plaintiff also requested that affidavits from the administrative record be admitted. This request was denied. The judge held that plaintiff failed to establish a prima facie case for violation of Title VII, but even if she did defendant established a legitimate business reason. No analysis was made regarding the issue of pretext. The trial judge also held that there was no evidence of a violation of the Equal Pay Act. Both claims were dismissed. The Court of Appeals affirmed, stating that the essence of the Equal Pay Act claim and the Title VII claim were the same. Plaintiff's Petition for Rehearing on

the basis that the decision was in conflict with Supreme Court decisions and that the Court of Appeals had misapprehended the facts basic to the Equal Pay Act claim was denied.

FACTS

TITLE VII

Undisputed evidence presented to the district court showed that in September, 1979, plaintiff, a black female recent law school graduate with 2-1/2 years of experience as a student attorney and awaiting the July bar examination results applied to the Veterans Administration Office of District Counsel in Detroit, Michigan for a general attorney position in response to its recruitment letter to a local law school seeking recent law school graduates for a general attorney trainee position. She was interviewed by Theodore Fernholz, Acting District Counsel, and informed that the entry level for a general attorney trainee position was GS-11. During

the interview he took her to the personnel office for further explanation of pay, increases, benefits and leave for the position. Evelyn Jones, Personnel Specialist, explained these matters as applicable for the GS-11 position as instructed by Mr. Fernholz. At trial Mr. Fernholz denied that he had informed plaintiff that the entry level was GS-11. Plaintiff sought to introduce the affidavit of Ms. Jones, taken by defendant's EEO investigator in 1980 and made part of the administrative record.[1] Ms. Jones stated in the affidavit that she had overheard Mr. Fernholz tell plaintiff that the entry level for general attorney trainee in Detroit was GS-11, was present when he informed plaintiff of such, and overheard him promise plaintiff that once she passed the bar she would receive the GS-11 attorney position. At

---

[1] The EEO Hearing Officer ruled in plaintiff's favor on the Equal Pay Act claim, but elected not to rule on the Title VII claim. Defendant rejected the decision.

the time of trial Ms. Jones had been transferred to the VA personnel office in Montgomery, Alabama. The trail judge denied the request for admission of the affidavit on the basis that Ms. Jones was not unavailable. (T. Tr. 6/29/87, pg. 8).

Evidence further showed that subsequent to the initial interview, Mr. Fernholz called plaintiff over the weekend and during his off-duty hours to offer to create an interim or temporary position "so that she could start early before the bar results arrived" (Testimony of Mr. Fernholz, T. Tr. 6/29/87, page 162, lines 8-16; page 163, line 6). A few days later he informed her that a GS-9 clerkship had been created. After being assured by Mr. Fernholz that she would still receive the GS-11 attorney position upon receipt of favorable bar results, Plaintiff accepted the clerkship and began work on October 21, 1979. Mr. Fernholz denied that he promised plaintiff the GS-11. She notified Mr. Fernholz of

favorable bar results two weeks later. He informed her that action would be commenced to convert her to the GS-11 attorney position. Instead, On November 7, 1979 he requested that she be converted to a GS-9 attorney position and sought to recruit a GS-9 or GS-11 attorney trainee. Several weeks later Mr. Fernholz informed plaintiff that she was not going to receive the GS-11 attorney position and stated that a GS-9 was all she was going to get and if she did not like it she could just leave. He also informed her that if she was "married and had kids" he "could see it". Mr. Fernholz denied making these statements. Plaintiff met the VA Qualification Standards for a GS-12 attorney (Plaintiff's Trial Exhibit #2). These Qualification Standards were in effect at the time plaintiff was hired.

In October, 1979, Richard Cunningham, a white male, also applied for a general attorney position with this office. He had passed the bar six

months earlier but had no legal experience. At the time, he was employed as chief of field service, a non-legal competitive service position in the Department of Veteran's Benefits, a position to which he had recently been appointed. The office of District Counsel hired him as a GS-12 attorney (Testimony of John MacMillan District Counsel, T. Tr. dated 6-29-87 - page 35, lines 12, 16 and 24), even though the regulations require that one with no legal experience as set forth in the VA Qualifications Standards be hired at the GS-9 attorney level. (Testimony of J. MacMillan T. Tr. dated 06-29-1987- page 30, lines 17-22; page 42, lines 11-16). Mrs. Cunningham's, work assignment was not as diverse as plaintiff's. She trained him (T. Tr. 6/30/87, pg. 42, line 23, pg. 43, lines 1-19).

In 1977 or 1978 a white female with teaching experience of an unknown nature, but no legal experience was hired as a GS-11 attorney.

As of November, 1979 the organizational chart of the professional staff in the Detroit Office of District Counsel was as follows:

Position	Race	Sex	Grade	Entry Level & Experience
District Counsel - MacMillan	White	Male	GS-15	----------
Ass't District Counsel - Fernholz	White	Male	GS-14	----------
General Attorney - Winslow	White	Male	GS-13	Less than one year
General Attorney - Wright	White	Male	GS-13	Two months General
General Attorney - White	White	Male	GS-13	None
General Attorney - Couch	White	Male	GS-13	GS-11 - None
General Attorney - Faes	White	FM	GS-13	GS-11 - None
General Attorney - Vollmar	White	Male	GS-13	GS-11 - None
General Attorney - Cunningham	White	Male	GS-12	GS-12 - None
General Attorney - Culberson	Black	FM	GS-09	GS-09 - 2-1/2 Years

Mr. Coy, Deputy General Counsel in Washington, D.C., testified that the qualifications and classification standards for attorney positions are issued by the Office of Personnel Management (T. Tr. 6/30/87, pg. 18, line 23; pg. 19, line 1). The federal statutes governing the terms and conditions, policies and authorized procedures for employment with federal agencies is set forth in Title 5 United States Code Section 5101 et. seq. (Appendix 21a hereto) Defendant alleged that it had established a "GS-9 only" hiring policy, but there were exceptions based on the qualifications and experience of the attorney (Mr. Coy: T. Tr. 6/30/87 pg. 95, lines 22-25, Mr. MacMillan: T. Tr. 6/29/87 pg. 93). No documentary evidence of such a policy was presented and none could be found in Title 5. Nevertheless plaintiff showed, and it was undisputed, that she met this exception. Plaintiff produced documentary evidence that she met the VA qualifications for a GS-12 attorney, *(plaintiff's Exhibit 8)*, that Mr.

Cunningham did not meet the exception and that federal agencies were directed to hire racial minorities in grades 11 and above and women in grades 9 and above in order to alleviate the underrepresentation of these groups in the federal employment sector (5 C.F.R. 720.901, Subpart J).

At trial plaintiff filed a motion to suppress any affirmative defenses which defendant might raise or seek to raise during the trial. The trial judge took the motion under advisement but never issued a decision on it. (T. Tr. 6/29/87, pg. 4-5) At trial plaintiff attempted to produce affidavits from the administrative record as material evidence. (T. Tr. 6/29/87, pg. 8):

(1) affidavits from the administrative record which showed that plaintiff was informed at the initial interview that the entry level for attorneys in the Detroit District

Counsel Office was GS-11 and that plaintiff was promised a GS-11 attorney if she passed the bar.

(2) affidavit from the administrative record which showed that a black male had applied for a general attorney position shortly after defendant sought recruitment for a GS-9 or GS-11 attorney trainee in November, 1979 but he was never called for an interview and upon inquiry was informed that there were no openings, despite the fact that interviews were taking place for the positions which subsequently went to Mr. Golski and Mr. Lafave, white males hired in early 1980.[2] Plaintiff also attempted to produce

---

2 After the Jones affidavit was ruled inadmissible plaintiff's counsel, declined to pursue arguments to admit other affidavits, taken during the administrative process.

evidence of reneged promises made to other black females regarding employment opportunities. The court denied the request (T. Tr. 6/30/87, pg. 55) Further, the court did not consider evidence which showed that plaintiff made a suggestion pursuant to defendant's solicitation for productivity methods; the suggestion was approved but half of the award was given to a white male.

EQUAL PAY ACT

Evidence further showed that after plaintiff filed a complaint pursuant to defendant's EEO procedures, the Detroit District Counsel hired two (2) white males at the GS-9 attorney level. One of those males performed debt collection work. (T. Tr. 6/29/82, pg. 41 Line 19, Pg. 71) The other performed work of a different nature from plaintiff. (T. Tr. 6/29/87, pg. 70) Approximately seven (7)

months later Mr. Fernholz wrote a letter to the General Counsel in Washington, D.C. stating that plaintiff had been employed as a GS-9 attorney for 10 months and had performed diverse assignments "consistently exceeding the requirements of the GS-11 level." Both Mr. Fernholz and Mr. MacMillan admitted that plaintiff was being paid as a GS-9 attorney during this time (T. Tr. 6/29/87 Pg. 74; T. Tr. 6/30/87 pg. 187) It was undisputed that plaintiff was actually performing work at the GS-13 level, the same as white male GS-13 attorneys, Couch, Vollmar, Wright, and Winslow, and that she continued to perform at this higher level through the time of the trial.

REASONS FOR GRANTING WRIT

Introduction to Arguments

Preliminary to the Arguments, plaintiff notes that a decision by a district court on the issue

of discrimination under Title VII is subject to review under the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982); Findings are clearly erroneous if upon review of the entire record the court is left with a definite and firm conviction that a mistake has been committed. *United States v. Gypsum*, (333 U.S. 364 (1948). The clearly erroneous standard does not insulate either the trial court's conclusions of law, *Pullman-Standard*, supra, or factual findings that result from application of incorrect legal principles. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, 2182, 2188, 72 L. Ed. 2d 606 (1982). Rule 52(a) does not proscribe the standard of review for questions of law or questions of fact predicated on an erroneous view of the law. *Bose v. Consumers Union*, 104 S. Ct. 1949 (1984).

Where documents or objective evidence contradict a witness' story, or the story itself is so internally flawed that a reasonable fact finder would not credit it, the Court of Appeals may well find clear error. *Anderson v. City of Bessemer City, N.C.*, 105 S. Ct. 1504, 1513 (1985).

The Court of Appeals should examine all of the evidence in the record relating to salary disparities under the clearly erroneous rule. *Brazemore vs. Friday*, 106 S. Ct. 3000 (1986)

Title VII prohibits discrimination on the basis of race and sex in hiring, promotion, classification and, terms and conditions of employment....except when such action is based on a bona fide seniority system, merit system, system based on

quantity or quality of production 42 U.S.C. 2000e, et seq.

The Equal Pay Act prohibits discrimination on the basis of sex by paying a member of one sex less than the other for jobs the performance of which requires equal skill, effort and responsibility, except when the pay differential is based on the same affirmative defenses set forth in Title VII, plus a factor other than sex.

This Court has noted that employment procedures which operate as built in head-winds for minority groups and which are unrelated to job capability cannot withstand a prima facie case of discrimination, *Griggs v. Duke Power Co*, 401 U.S. 424 (1971). Discrimination in terms, conditions, or privileges of employment violates Title VII, *Hishon v King, Spaulding et al.*, 467 U.S. 69 (1984) (promise made to female attorney not kept, while promise

made to male attorneys could constitute a violation of Title VII). Where one has an affirmative duty to eradicate discrimination, failure to do so gives rise to an inference of discriminatory animus. *Columbus Board of Education v Pernick*, 443 U.S. 449, 99 S. Ct. 1941, 61 L.E.d., 2d 666, (1979).

This Court stated that Title VII prohibits discriminatory, arbitrary, and unnecessary barriers to employment in any way that would deprive or tend to deprive an individual of employment opportunity. This Court further stated that where an employer uses a non-job related barrier in order to deny a woman or a minority applicant employment or promotion and that barrier has a significant adverse effect on the woman or minority, then the individual has been denied employment opportunity because of race or sex... *Connecticut v Teal*, 102 S. Ct. 2525, 457 U.S. 440 73 L.Ed. 2(d) 130 (1982). "An Appellate

Court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary." *Thorpe v Housing Authority of City of Durham*, 393 U.S. 268, 281, 89 S Ct., 518 (1969); and *Bradley v School Board of City of Richmond*, 416 U.S. 696, 711 (1974). The Court of Appeal's decision is contrary to or in conflict with the above-referenced principles for the reason set forth in the arguements below.

TITLE VII

I.

THE COURT OF APPEALS ERRED BY NOT APPLYING THE ANALYSIS SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* IN REVIEWING THE DISTRICT COURT'S DETERMINATION THAT THE PLAINTIFF, A BLACK FEMALE ATTORNEY WITH THE VETERANS ADMINISTRATION DETROIT OFFICE OF DISTRICT COUNSEL, FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ON THE BASIS OF RACE AND SEX.

In *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S Ct. 1080 (1981), this Court set out a tripartite scheme of proof of an allegation of a violation of Title VII by a preponderance of the evidence:

(1) Plaintiff's prima facie case.
(2) Defendant's articulated "legitimate non-discriminatory reason."
(3) Plaintiff's evidence of pretext which may consist of direct evidence, such as statements of admissions, comparative evidence, or statistics.

Neither the District Court or the Court of Appeals correctly applied this test as required by this Court. In *McDonnell Douglas*, this Court stated that in order to establish a prima facie case of discrimination on the basis of race and sex, a plaintiff in a Title VII action has the initial burden of establishing facts by a preponderance of the

evidence which shows that he or she: 1) is a member of a protected group; 2) applied for a particular job for which the employer was seeking applicants; 3) was qualified for the job; but 4) was rejected, and the employer continued to seek other applicants with plaintiff's qualifications. The degree of proof is merely by creating an inference of denial, of an employment opportunity, not to a scientific certainty. *Brazemore v. Friday*, 106 S. Ct. 3000 (1986). *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984). However, the specification of the prima facie proof in *McDonnell Douglas* is not necessarily applicable in every aspect to differing factual situations, *McDonnell Douglas*, supra, 411 U.S. at 803 (N13; *International Brotherhood of Teamsters v United States*, 431 U.S. 358 (1977); *Burdine*.

Plaintiff established her prima facie case by producing undisputed and uncontroverted evidence

that she: (1) was a member of a protected group (black and female); (2) applied for a general attorney position in response to defendant's recruitment letter seeking recent law school graduates for a general attorney trainee position; (3) was a qualified applicant in that she met the specifications advertised (had the recruitment letter specified recent bar admitted, plaintiff would not have been so qualified to apply). Mr. Fernholz testified that it was understood that she would have to pass the bar before being hired as an attorney; (4) was hired as a GS-9 attorney even though she met the VA Qualification Standards for a GS-12 attorney position in that she had 2-1/2 years of legal experience; (5) a white male with no legal experience was hired as a GS-12 attorney even though he only met defendant's qualification standards for a GS-9 attorney position; (6) a white female with no legal experience was hired as a GS-11 attorney.

Evidence showed that plaintiff accepted the interim or temporary GS-9 law clerk position pending receipt of the bar results. Plaintiff testified that it was accepted after being assured by Mr. Fernholz that she would receive the GS-11 attorney position upon receipt of favorable bar results. Plaintiff showed that she met the prerequisite to the attorney position within 2 weeks of commencing the temporary position. Instead of recommending her for the GS-11 attorney position as promised, Mr. Fernholz recommended her for a GS-9 attorney position and sought to recruit a GS-9 or GS-11 attorney trainee. Plaintiff showed that Mr. Fernholz and Mr. MacMillan had recommended that the white male be hired as a GS-12 attorney and that the white female be hired as a GS-11 attorney even though they were only qualified for a GS-9 attorney position.

The trial judge's decision did not consider the undisputed facts and admissions of defendant in determining whether plaintiff had established a prima facie case. In *Continental Ore Co., v Union Carbide Co.*, 370 U.S. 690 699, 82 S. Ct. 1404, 1410 (1962), this Court stated that "Appellants should be given the full benefit of their proofs." The decisions of the Court of Appeals and the District Court are in conflict with this decision because uncontroverted evidence and admissions of defendant favorable to plaintiff were not considered by the courts. "While Rule 52(a) does not require a trial judge to account for all of the evidence presented, it does require the judge to account for or refer to uncontradicted evidence." *Griffin v City of Omaha*, 785 F2d 620 (CA 8, 1986) (Black female recruits who were terminated from city policy department training program sued alleging race and sex discrimination;

trial judge dismissed; Court of Appeals reversed and remanded finding trial court's findings clearly erroneous for failure to account for evidence favorable to plaintiff, disregard of uncontradictory evidence, and passing over other important evidence). The decision is also contrary to long established precedent of the Court of Appeal, See, *Clemmons v Board of Education of Hillsboro*, 228 F 2d 853 (C.A. Ohio 1956) Cert denied 76 S. Ct. A 651, 350 U.S. 1006 (held failure or refusal to properly apply the law to conceded or undisputed facts is an abuse of discretion; misapplication of the law to the facts is itself abuse of discretion requiring re-reversal).

The trial judge failed to apply the law set forth by this Court in determining whether plaintiff established a prima facie case. Such action, sanctioned by the court of Appeals, requires the supervision of this Court.

II.

THE COURT ERRED AS A MATTER OF LAW BY NOT CORRECTLY INTERPRETING AND APPLYING THE FEDERAL STATUTE GOVERNING EMPLOYMENT POLICY BEFORE CONCLUDING THAT DEFENDANT ESTABLISHED "LEGITIMATE BUSINESS" REASONS TO PLAINTIFF'S CLAIMS.

In the Answer and Final Pretrial Statement defendant alleged that: 1) Mr. Fernholz, the hiring official, did not promise plaintiff that she would be promoted immediately upon passing the bar; 2) the usual "time in grade" as a GS-9 is one year before being promoted to a GS-11; 3) the white who started the same day as plaintiff as a GS-12 was not similarly situated in as much as he was already an attorney and had been with the VA for several years; 4) assuming that Mr. Fernholz made the promise, it is not binding on the VA because it is contrary to Agency policy. On the day of trial plaintiff argued a motion to suppress any defenses which defendant might seek to raise during the trial.

The gist of plaintiff's motion was that Rule 8(c) of the Federal Rules of Civil Procedure provide that a party must set forth all affirmative defenses and any other matter constituting an avoidance in its answer or final pretrial statement, otherwise such matters are waived. In support of the motion plaintiff cited *Jackson v. Seaboard Coast Line R. R. Co.*, 678 F2d 992 (11th Cir. 1982), for the proposition that statutory defenses or exceptions in a Civil Rights action are affirmative defenses which must be pled in the first responsive pleading or final pretrial statement, and *Morgan Guaranty Trust Co. of New York City v Blum*, 649 F.2d 342 (C.A.5 , 1981); and *Pinto Trucking Service, Inc. v Motor Dispatch, Inc.*, 649 F2d 530 (C.A. 7, 1981). See also *Musico v Champion Credit Corp.*, 764 F 2d 102 (C.A. 2, 1985). The trial judge took the motion under advisement. During the trial the judge refused to allow plaintiff to introduce evidence not listed in the final pretrial

statement unless the motion was waived. Plaintiff abandoned efforts to introduce other such evidence. Although the trial judge had taken the motion under advisement he never issued a decision. In fact he rendered a decision on the case in chief without deciding the motion. The decision placed a great deal of emphasis on the fact that plaintiff had stated on her job application that $16,000.00 was the minimum starting salary that she would accept. The Court of Appeals also based its decision primarily on this argument. Ms. Jone's affidavit was crucial to determining whether plaintiff was willing to accept a GS-9 attorney position. She was present when Mr. Fernholz assumed plaintiff that if she accepted the GS-9 clerkship and passed the bar, she would receive the GS-11 attorney position. Exclusion of the affidavit was erroneous as a matter of law. It is customary for a court to dispose of all preliminary matters prior to rendering a decision. Although the

judge stated that he would rule on the motion at the end of the matter, he failed to do so.

The Court of Appeals departed from and sanctioned the trial court's departure from the accepted course of judicial proceedings. The decision conflicts with decisions rendered in the Eleventh, Seventh, Fifth and Second Circuits on the issue of waiver and the Federal Rules of Civil Procedure, Rule 12 (b) which provides that every defense in law or fact to a claim for relief in any pleading shall be asserted in the responsive pleading, if one is required, except that the certain defenses may at the option of the pleader be made by motion. Defendant did not make a motion to allege the $16,000.00 as a defense. During the 8-1/2 years that the case was pending, defendant never alleged that it had relied on the numerical figure set forth on the application.

Therefore, its allegation at trial that that was a basis is not worthy of credence.

The Court deviated from the usual course of judicial proceedings in applying or construing the "national policy." It is well established that where resolution of a question of federal law, terms, statutes or enactments of Congress are at issue, the court should first look to the statutory language to ascertain Congressional intent. *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Consumer Product Safety v GTE Sylvania*, 447 U.S. 102 (1980); *Blum v Stenson*, 465 U.S. 886 (1986). The purpose of Title 5 U.S. Code is to provide a scheme whereby employment in the federal government will be made on the basis of qualification.

The national policy which the Court stated allowed Mr. Cunningham to be transferred is found

at Title 5 U.S.C. 5361-5366, which provides for pay retention of an employee who is placed in a lower grade as a result of reduction in force procedures or whose position is reduced in grade as the result of reorganization or reclassification of the position, there was no evidence or allegation that Mr. Cunningham's non-attorney position was reduced in grade. He was hired into an entirely different department, with different duties and responsibilities. There was no reduction in force. He made a voluntary move to a new job compatible with his newly acquired license to practice law. The entry level for this new job was GS-9. He did not possess qualifications above this level. He did not meet the criteria for the exception to the "GS-9 only" policy nor grade or pay retention. The court erred by not closely scrutinizing the reasons proffered by defendant and by not interpreting the statutes governing federal personnel policy as intended by Congress.

Title 5 C.F.R. 536.101-209 contains the regulations which the Office of Personnel Management has prescribed for the administration of grade and pay retention. Section 103 (1) provides that grade retention shall apply to an employee who moves to a position which is lower graded than the position held immediately prior to the demotion as the result of reduction in force or reclassification of the position. Subsection (b) provides that the head of the agency may offer grade retention to eligible employees who might be reduced in grade as the result of reclassification or reorganization announced by management in writing. Subsection 105 specifically excludes coverage for grade and pay retention for an employee who is reduced in grade or pay for personal cause or at the employee's request.

Eligibility for grade retention also ceases if the employee elects in writing to terminate the

benefits of grade retention. Subsection 536.207 (a) (4) and (b) (1). "Demotion at an employee's request" means a reduction in grade which is initiated by the employee for his or her benefit, convenience or personal advantage. Subsection 102. Clearly, Mr. Cunningham did not meet the grade retention requirements. He voluntarily applied for the attorney position. On October 18, 1979, he relinquished in writing any benefits he would have had by virtue of competitive service (J. M. MacMillan, T. R. 6-29-87, page 107). The Legislature has proscribed the circumstances under which a federal employee may be accorded a preference in employment. Clearly, no preference is authorized when the move is for personal cause.

Title 5 U.S.C. 2302 (b) (6) prohibits federal employers from granting preferences or advantages not authorized by law rule or regulation to any

employee or applicant for employment (including defining the scope or manner of competition or requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

Since the "legitimate business reason" referred to by the Court of Appeals are contrary to the statutory objective criteria for government employment, it was error as a matter of law for the Court to sanction such act as a defense to plaintiff's claims.

The defense sanctioned by the Court of Appeals in the instant case is contrary to the congressional purpose as clearly set forth in the national policy and has an adverse impact on all members of the protected groups which have been found by Congress to be underrepresented in the

federal workplace. Employment procedures which operate as built in head-winds for minorities and are unrelated to job capability cannot withstand a prima facie case of discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971). The national policy was circumvented to accord an unauthorized preference to the white male, and to deny plaintiff employment opportunity based on merit principles. In *Barber v International Brotherhood of Boiler Makers*, 778 F 2d 750, on remand 651 F Supp. 265 (CA 11, Ala. 1985) where officials circumvented certain prohibitative rules to aid advancement of white employees but did not bend the rules for black employees, they engaged in racial discrimination.

This Court has stated that Title VII prohibits discriminatory, arbitrary and unnecessary barriers to employment in any way that would deprive or tend to deprive an individual of employ-

ment opportunity. This Court further stated that where an employer uses a non-job related barrier in order to deny a woman or a minority applicant employment or promotion and that barrier has a significant adverse effect on the woman or minority, the individual has been denied employment opportunity because of race or sex *Connecticut v Teal*, 102 S. Ct. 2525, 457 U.S. 440 73 L. Ed. 2 d 130 (1982). The decision is in conflict with this Court's decisions on the test to be applied in reviewing a defense to a Title VII claim for the reasons set forth herein and in Arguement III.

In *Village of Arlington Heights v Metropolitan Housing Development*, 429 U.S. 252, 267 (1977), this Court noted that a United States agency's deviation from internal regulations and procedures cannot serve as the basis of a legitimate explanation sufficient to overcome a prima facie case of dis-

crimination. The defense must be a legitimate non-discriminatory reason not just any reason. *Jennings v Tinsley Park Community School*, 796 F2d 962, (C.A. 7, 1986). Defendant deviated from the national policy and the objective criteria set forth in its qualification standards to the extent of according a preference to Mr. Cunningham and Ms. Faes, while at the same time refusing to follow the national policy and objective criteria or the preference with respect to plaintiff. The Court of Appeals erred in not correctly interpreting or applying the national policy.

III.

THE COURT'S FAILURE TO APPLY THE THIRD PHASE OF THE TRIPARTITE TEST SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* REGARDING THE ISSUE OF PRETEXT IN REVIEWING THE PLAINTIFF'S CLAIM OF VIOLATION OF TITLE VII IS ERRONEOUS AS A MATTER OF LAW.

Contrary to the standard of review customarily required by this Court, the lower Court failed to make findings of fact and conclusions of law on the issue of pretext. See *Mcdonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973); *Burdine v Texas Department of Community Affairs*, 450 U.S. 248 (1981); *Cooper v Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); and *Brazemore v Friday*, 106 S Ct. 3000 (1986). Having found that there was a "GS-9 only" hiring policy, the lower court should have gone further to determine whether the policy was applied equally when plaintiff and Mr. Cunningham were hired. Mr. MacMillan testified that there were exceptions to the policy depending on the applicant's qualifications and experience (T. Tr. 6/30/87, page

95, lines 22-25). This exception was apparently not applied in plaintiff's case even though she possessed qualifications substantially above the GS-9 level, and was an extremely desirable potential employee as evidenced by the fact that Mr. Fernholz went to the extent of calling her during his off-duty hours and over the week-end to offer her an interim position "so that she could start early before the bar result arrived.", (T. Tr. 6/29/87 - page 162, lines 8-16; page 163, line 6). Neither the white male nor the white female possessed qualifications above the bare minimum for a GS-9 attorney. Mr. MacMillan testified that nevertheless, he recommended that they be hired at their respective levels and that the Washington Office approved the recommendation (T. Tr. 6/20/87 - page 29, line 19; page 52, line 15). He only recommended plaintiff for a GS-9 despite her qualifications for a GS-12. Relevant evidence concerning pretext would include unequal application

of the nondiscriminatory reasons offered by the employer for its employment decision. *McDonnell v Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *McDonnell-Douglas Corp v Green*, supra, 411 U.S. 792; *Worthy v U.S. Steel Corp.*, 616 F2d 698 (1980); *Corley v Jackson Police Department*, 566 F2d 994 (5th Cir. 1978); *Ste. Marie v Eastern R. R. Assn.*, 650 F2d 395 (2nd Cir. 1981). It also includes evidence of failure of the employer to live up to its affirmative action program, *Taylor v Teletype Corp.*, 648 F2d 1129, 1135 (8th Cir. 1981) cert. denied 454, U.S. 969 (1981); *Page v Bolger*, 645 F2d at 231 (1981); and evidence of the employer's general policy and practice with respect to employment of members of the protected class, including statistical manifestations of that policy and practice, *International Brotherhood Teamsters v United States*, 431 U.S. 324 (1977); *McDonnell-Douglas Corp. v Green*, supra. Plaintiff produced evidence which showed that prior

to plaintiff, defendant had not hired any black attorneys in the Detroit office of District counsel since the office was established. Nor had it hired any during the 8 years since plaintiff was hired despite the fact that there had been vacancies and 3 white males were hired. The trial judge refused to allow evidence of treatment of other women. The trial judge discounted the relevance of the broken promise to plaintiff.

The Court of Appeals sanctioned the trial court's departure. No documentary evidence of a "GS-9 only' hiring policy was produced. Plaintiff produced documentary evidence of, and requested the trial judge to take judicial notice of Title 5 Code of Federal Regulations, part 720, Appendix J which directed all federal agencies to hire racial minorities in positions at and above GS-11, and women above

GS-9 in order to alleviate the underrepresentation of these groups in federal employment.

The reasons proffered by Defendant did not legally justify hiring Plaintiff at the lower GS-9 attorney level. Briefly: "time in grade" applied to promotions not hiring; the "9 only" hiring policy was not applied to the white male; even though Mr. Fernholz and Mr MacMillan thought they had authority to hire at GS-9 and GS-11, Plaintiff was never recommenced for the GS-11 position, notwithstanding her qualifications and job performance above that level; the white male did not meet the statutory requirements for a transfer or reassignment. Defendant's proffered "defenses" were unworthy of credence and contrary to the law governing federal employment. Neither the Court of Appeals or the District trial judge considered the

issue of pretext. Such action was clearly erroneous as a matter of law.

EQUAL PAY ACT

IV.

WHETHER THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S EQUAL PAY ACT CLAIM IS IN ESSENCE THE SAME AS HER CLAIM FOR VIOLATION OF TITLE VII WHEN BOTH CLAIMS ARE BASED ON DIFFERENT FACT AND THE RECORD CLEARLY REVEALS THAT PLAINTIFF WAS PAID LESS THAN GS-13 WHITE MALE ATTORNEYS FOR THE JOB ACTUALLY PERFORMED.

The Equal Pay Act (the Act) provides than an employer shall not discriminate "between employees on the basis of sex by paying wages to employees... at a rate less than the rate (paid)...to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 29 U.S.C. 206(d)(1). The term "employer" includes the federal government, Id. 203(d), (x); see also 203(e)(2).

The plaintiff in an Equal Pay Act case has the initial burden of proving a violation by demonstrating that: 1) an employer pays or paid different wages to employees of the opposite sex in an establishment, when they are doing equal work on jobs, the performance of which requires equal skill, effort, and responsibility.

Plaintiff showed precisely that while performing work with the same degree of skill, effort and responsibility at the grade 13 attorney level held by white males, she was paid at the grade 9 rate. J. M. MacMillan, the District counsel in Detroit and in charge of the office where Plaintiff works wrote a letter dated 8/8/80 stating that for ten months Plaintiff had been employed as an attorney performing work "consistently exceeding the GS-11 level". This letter was admitted into evidence as Plaintiff's Trial Exhibit #23 (T. R. 6-29-87, page

70). Plaintiff's Trial Exhibit #14 showed that the GS levels above GS-11 are GS-12 through 18. Title 5 U.S.C. 5104 shows likewise.

Further, Mr. MacMillan admitted at trial that during this time Plaintiff was being paid at the GS-9 rate (T. Tr. 6/29/87, page 72). Theodore Fernholz, his assistant, corroborated these facts and testified that Plaintiff did a good job performing the work above the GS-11 level, that he recommended a promotion based on the "quality and complexity" of her work, that she was being paid as a GS-9 at the time and that the senior attorneys were all white males (T. Tr. 6/29/87, page 188-189). Mr. Fernholz further testified that the duties of a law clerk and an attorney were substantially the same, except for court appearances. (T. Tr. 6/29/87, page 166). The Court erred by not reviewing the plaintiff's claim under the standard of review required by this Court

in the cases set forth in the preliminary arguments supra.

The Equal Pay Act sets forth four affirmative defenses which must be pled and proven in order to justify wage disparity between males and females. These exceptions are a bona fide: (1) seniority system, (2) merit system, (3) system based on quantity and quality of production and (4) a factor other than sex. 29 U.S.C. 206 (d) (1). Plaintiff contended during trial and on appeal that defendant did not allege a bona fide exception to justify paying her less than it paid white males Couch, Vollmar, Winslow and Wright for the same or similar work at the GS-13 level. Prior to trial, plaintiff made a motion to suppress any affirmative defenses which defendant might raise during trial. The trial judge took the motion under advisement but never made a ruling. During the trial, defendant

did not proffer a reason for paying plaintiff less than the GS-13 white males. At the conclusion of the trial the judge stated that defendant had shown "legitimate business reasons" for hiring plaintiff at a lower level than the white male, Mr. Cunningham and the white female, Ms. Faes.

The Court of Appeals affirmed the dismissal stating that "in essence, the basis of all Ms. Culberson's claims is the fact that attorneys Faes and Cunningham were employed at a grade and salary level higher than she was by the Detroit Office." The court suggested that plaintiff was willing to work for less as evidenced by the fact that she had stated on her application that the minimum starting salary she would accept was $16,000.00.

Plaintiff petitioned for rehearing in banc of the Court of Appeals decision on the basis that:

(1) On page 6 of the decision, the Court states that the basis of the Equal Pay Act claim was the fact that Ms. Faes and Mr. Cunningham were employed at a grade and salary level higher than plaintiff. This statement was in error. Review of the trial testimony of plaintiff at pages 41, 46-50, 59-60, 64,67 and 69, the Final Pretrial Statement, page 15 of Appellant's Responsive Brief, Testimony of John MacMillan 6/29/87 transcript page 72 and the testimony of Theodore Fernholz 6/29/87 transcript pages 188-189, clearly reveal that the basis of the plaintiff's

Equal Pay Act claim was the fact that she was paid less than white males Couch, Vollmar, Wright and Winslow for performing the same work with the same degree of skill effort and responsibility. Defendant admitted that plaintiff was paid less, notwithstanding the fact that she was assigned and performed the work at the higher grade level satisfactorily. Defendant did not proffer an explanation for the pay differential. Plaintiff specifically testified that her work was different from and of greater quality than that performed by Cunningham. Defendant did not dispute this fact.

Reasons For Granting Writ

The United States Supreme Court in *Continental Ore Co. v Union Carbide Carbon Co., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410 (1962)* stated that "Appellants should be given the full benefit of their proofs without tightly compartmentalizing the various factual components..." Appellant respectfully represented that she was not given the benefit of any of her undisputed proofs in her claim for violation of the Equal Pay Act.

Plaintiff testified that the work was performed at the GS-13 level held by white males (T. R. 6/30/87, page 41, 46-50, 59-60, 64 and 67). Mr. Cunningham was a GS-12.

Neither Court considered the statutes governing the terms and conditions of federal employment which the Veterans Administration was obligated to follow in hiring, promotion, and in establishing the rate of pay commensurate with the work actually performed by an employee. Neither Court considered case law governing claims of violation of Title VII of the Civil Rights Act and the Equal Pay Act.

Actual job performance is the critical factor for determining the rate of pay of a federal employee. 5 U.S.C. 2301 (b) (3) and 5 U.S.C. 5101. The degree of skill, effort and responsibility required to perform at a particular grade level is defined by statute and is divided into 18 grade levels of difficulty and responsibility. 5 U.S.C. 5104.

Federal employment policy provides that the purpose of the grades is to provide a plan of classification whereby:

> (1) In determining the rate of basic pay which an employee will receive --
>
> (A) the principle of equal pay for substantially equal work will be followed; and
>
> (B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service." 5 U.S.C. 5101.

Hence the work assigned to an employee should be commensurate with the grade level to which the employee is assigned; the rate of pay should be commensurate with the work assigned.

Burroughs v Office of Personnel Management, 764 F 2d 1300 (CA9, 1985). The moment the District Counsel's Office began requiring Plaintiff to perform work above the GS-9 level, it should have begun paying her at the highest level commensurate with the work being performed. There was no evidence that other law clerks in the country for the VA were required to work at the GS-13 level for a GS-9 rate. Nor was there such evidence pertaining to the white males hired at GS-9 or Mr. Cunningham.

There is no provision in the U.S. Code governing federal employment which requires a specified amount of time in a particular grade before promotion to another grade. The only time in grade requirement remaining after repeal of the Whitten Amendment is for periodic step increases within a grade. 5 U.S.C. 5334. This statute does not apply

to an increase in pay granted by statute. Subsection (d).

The national policy further provides that promotion of a federal employee should be determined solely on the basis of relative ability, knowledge and skills. 5 U.S.C 2301 (b) (1). Equal pay should be provided for work of equal value and appropriate incentives and recognition should be provided for excellence in performance. 5 U.S.C. 2301 (b) (3).

The Court of Appeals' decision is also in conflict with well established precedent of this Court: *Gunther v Washington Co.*, 101 S Ct. 2242, 452 U.S. 161, 68 L. Ed. 2d 751 (1981) (actual job performance and content, not title, classifications or descriptions is determinative); *Corning Glass Works v Brennan*, 417 U.S. 188, 190 (1974), where the court

stated that a pay differential based on a woman's willingness to work for less money is in itself unlawful. Even if plaintiff was willing to work for less than the males, that was not a valid basis for discrimination in compensation. See also, *Di Salvo v Chambers of Commerce*, 416 F. Supp 844, affirmed in part modified in part on other grounds, 568 F 2d 593 (CA 8 1981). In *Lafferty v Northwestern Airlines, Inc.*, 185 App. D. 322, 567 F 2d 429 (1976) cert denied 434 U.S. 1086, 98 S Ct. 1281, 55 L. Ed. 2d 792, this court stated that the historical willingness of women to accept inferior financial rewards for equivalent work was precisely the outmoded practice which the Equal Pay Act sought to eradicate and which was, by implication, also prohibited by Title VII. See also, *Fitzgerald v Sirloin Stockades, Inc.*, 624 F 2d 945 (CA 10 1988) (Female who actually performed her job at a higher level for less pay than males proved a violation of Title VII. The Equal Pay

Act was not controlling simply because the standards were not met).

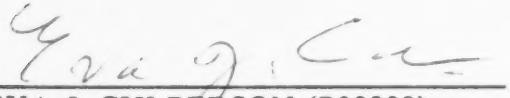
Plaintiff's actual job content was that of a GS-13 attorney. Yet she was paid at a lower level. Defendant did not proffer an explanation for paying plaintiff less for performing work at the GS-13 level held by white male attorneys. This Court has held that failure to distinguish between pay differentials is fatal to an employer's defense. *Los Angeles Department of Water and Power v Manhart*, 435 U.S. 702 (1978). The Court of Appeals erred in not applying the decisions of this Court in reviewing plaintiff's Equal Pay Act claim. The Court of Appeals erred in not correctly applying the federal personnel statutes governing pay for actual job performance. Finally, the Court of Appeals erred in concluding that the Equal Pay Act claim and the Title VII claim were the same when in fact they

arose out of different factual circumstances requiring different standards of review.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this petition for Writ of Certiorari be granted.

Respectfully represented,



EVA J. CULBERSON (P30902)